DATE: March 10, 1997
CASE NO.: 95-INA-179

In the Matter of:

DINGCHIN JAMES TSAI, D.D.S.,
Employer

On Behalf Of:

MING-RONG CHEN,
Alien

Appearance: Audrey W. Chen, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(14) of the Immigration and Nationality Act of 1990, 8 U.S.C. § 1182(a)(14) (1990) ("Act"). The certification of aliens for permanent employment is governed by § 212(a)(5)(A) of the Act, 8 U.S.C. § 1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(14) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of the application for visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On June 28, 1993, DingChin James Tsai, D.D.S. ("Employer") filed an application for labor certification to enable Ming-rong Chen ("Alien") to fill the position of Bi-Lingual Dental Assistant (AF 60). The job duties for the position are:

> Assist dentist during examination and treatment of patients; prepare patient, assist during dental procedures; take and record medical and dental histories and vital signs of patients; provide postoperative instructions prescribed by dentist.

The requirements for the position are two years of experience in the job offered. The Employer noted Other Special Requirements as must be able to communicate with patients in Mandarin Chinese.

The CO issued a Notice of Findings on May 20, 1994 (AF 53), proposing to deny certification on the grounds that the Employer's advertisement lacks specificity in that it did not inform potential applicants of the prevailing wage in violation of 20 C.F.R. § 656.21(g). The CO further proposed denial on the grounds that the position did not comply with the terms and conditions of California State law in violation of 20 C.F.R. § 656.20(c)(7), in that it required duties that could only legally be performed by a dental technician certified as such under State law. The CO notified the Employer that it must readvertise, deleting the x-ray requirement, and submit a signed affidavit defining exactly what other duties were included in the language, "perform basic supportive dental procedures under the supervision of a licensed dentist."

In its rebuttal, dated August 30, 1994 (AF 14), the Employer contended that it had readvertised according to the instructions in the NOF, including amending the ad to reflect only those duties which do not require the worker to be certified or registered in accordance with California State law. In addition, the Employer provided a signed affidavit which stated that the Alien was employed as a dental assistant in Taiwan for two years prior to being hired, no U.S. workers applied for the position, and giving a detailed explanation of the duties included in the language, "perform basic supportive dental procedures under the supervision of a licensed dentist."

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[1] All further reference to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

The CO issued the Final Determination on September 12, 1994 (AF 10), denying certification because although the Employer deleted some duties, the duty of "perform basic supportive dental procedures under the supervision of a licensed dentist," is so broad that it could include duties that require certification or registration under California State law in violation of 20 C.F.R. § 656.20(c)(7).

On October 20, 1994, the Employer requested review of the denial of labor certification (AF 1). The CO denied reconsideration and forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board").

Discussion

The regulations at 20 C.F.R. § 656.20(c)(7) require that the job offer must clearly show that the "employer's job opportunity's terms, conditions and occupational environment are not contrary to Federal, State, or local law."

In this case, the Employer was notified in the NOF that the job duties of a dental assistant involving x-rays required certification pursuant to California State law (AF 56). Per the CO's instructions in the NOF, the Employer contacted the local EDD, deleted the offending requirements, and readvertised the position with duties based on language obtained from the Board of Dental Examiners for the State of California for Dental Assistants (AF 30-34). The CO denied certification after the readvertisement, claiming that the language "perform basic supportive dental procedures under the supervision of a licensed dentist," could be construed as including duties involving x-rays (AF 10).

The CO argues that the Employer's language, even after readvertising, remains too broad (AF 12). The Employer argues that it has complied with the CO's requirements in the NOF in good faith, that its advertisement is consistent with California State law, was approved by the EDD, and that it is not required to list all duties "not required" of the position (AF 1-3).

The CO is not bound by any statements or actions of the local employment service. *Peking Gourmet*, 88-INA-323 (May 11, 1989); *Bob's Exxon*, 89-INA-259 (May 2, 1991). However, a violation of § 656.20(c)(7) requires an action "contrary" to State or local law. The Employer was in violation prior to the NOF, and it followed the CO's instructions in good faith to delete any offending requirements. The Employer's revised advertisement is not "contrary" to California State law, but is based on definitions of the Board of Dental Examiners for the State of California for Dental Assistants and the approval of the State employment agency. The Employer's advertisement is quite lengthy and specific in regards to the duties that are to be performed, and contains at least four times the information as any other ad for a Dental Assistant in the San Jose Mercury News (AF 44-46).

Based on the foregoing, we find that the Employer's listed duties are not so broad as to encompass unlisted duties that require certification or registration, and thus, are not contrary to State law. No other grounds for denial are stated by the CO.

ORDER

The Certifying Officer's denial of labor certification is hereby **REVERSED**.

Entered this the _____ day of March, 1997, for the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such a review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with the supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.